No. A-

IN THE

Supreme Court of the United States

CITY OF BOISE,

Applicant / Petitioner,

v.

ROBERT MARTIN, LAWRENCE LEE SMITH, ROBERT ANDERSON, JANET F. BELL, PAMELA S. HAWKES, AND BASIL E. HUMPHREY,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and this Court's Rule 13.5, the City of Boise respectfully requests a 60-day extension of time, to and including August 29, 2019, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The court of appeals entered its judgment on September 4, 2018. *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018). The Ninth Circuit issued an amended opinion and denied the City's timely petition for rehearing on April 1, 2019. *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). Copies of the opinion and amended opinion are attached hereto. Unless extended, the time in which to file a petition for a writ of certiorari will expire on July 1, 2019. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

1. Like many cities and towns across the country, the City of Boise, Idaho has enacted ordinances that prohibit (1) using "any of the streets, sidewalks, parks, or public places as a camping place at any time," and (2) "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof." *Martin*, 902 F.3d at 603–04. In recognition that some of the City's homeless population may be unable to obtain suitable shelter, however, the ordinances also provide that "[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter." *Id.* at 608.

Plaintiffs are six individuals experiencing homelessness who sued the City alleging that the ordinances violate the Cruel and Unusual Punishments Clause of the Eighth Amendment. *Id.* at 606. The district court granted summary judgment in favor of the City, *id.* at 607, but the Ninth Circuit reversed. The Ninth Circuit explained that Plaintiffs' Eighth Amendment claim was governed by *Powell v. Texas*, 392 U.S. 514 (1968), which considered whether a statute that proscribed public drunkenness violated the Eighth Amendment. *Martin*, 920 F.3d at 616. Justice Marshall, writing for a four-Justice plurality, held that it did not because the statute "made criminal not alcoholism but *conduct*"—even if that conduct may in some sense be "'involuntary'" for chronic alcoholics. *Id.*

Nevertheless, the Ninth Circuit held that *Powell* compelled a finding for Plaintiffs. In doing so, it looked to Justice White's concurrence, which speculated that, with respect to at least some people, "'I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible,'" in which case "'th[e] statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment.'" *Id.* Because "[t]he four dissenting Justices adopted a position consistent with that taken by Justice White," the Ninth Circuit concluded that "five Justices gleaned . . . the principle that 'the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" *Id.* at 617.

Deeming this principle to constitute the holding of *Powell*, the Ninth Circuit "h[e]ld . . . that 'so long as there is a greater number of homeless individuals in [a

jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.'" *Id.* In other words, cities and towns within the Ninth Circuit are now powerless to prohibit any individual experiencing homelessness—even one for whom a shelter bed is available—from camping in public so long as the total number of such individuals exceeds the total number of beds available in the jurisdiction. *See id.* at 590 (M. Smith, J., dissenting from denial of rehearing en banc) ("Under the panel's decision, local governments are forbidden from enforcing laws restricting public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions.").

The Ninth Circuit denied rehearing en banc over two separate dissents. The principal dissent, authored by Judge Milan Smith and joined by five other judges, explained that the panel's attempt to "metamorphosize[] the *Powell* dissent into the majority opinion[] defies logic" as well as this Court's precedent. *Id.* at 591 (citing *Marks v. United States*, 430 U.S. 188 (1977)). It then explained that the "panel's opinion also conflicts with the reasoning underlying the decisions of other appellate courts" that have rejected Eighth Amendment challenges to ordinances banning similar conduct. *Id.* at 593 (citing *Manning v. City of Caldwell*, 900 F.3d 139 (4th Cir. 2018), *reh'g en banc granted*, 741 F. App'x 937 (4th Cir. 2018); *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000); *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069 (1995)).

Finally, Judge Smith's dissent emphasized the disastrous consequences of the Court's decision, which "leaves cities with a Hobson's choice: They must either undertake an overwhelming financial responsibility to provide housing for or count the

number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety." *Id.* at 594. And the effects of the panel's sweeping decision are not limited to bans on public camping. Rather, by categorically "holding that the Eighth Amendment proscribes the criminalization of involuntary conduct, the panel's decision will inevitably result in the striking down of laws that prohibit public defecation and urination." *Id.* at 596.

A separate dissent from the denial of rehearing en banc, authored by Judge Mark Bennett and joined by four other judges, argued that "except in extraordinary circumstances not present in this case, and based on its text, tradition, and original public meaning, the Cruel and Unusual Punishments Clause of the Eighth Amendment does not impose substantive limits on what conduct a state may criminalize." *Id.* at 599 (Bennett, J., dissenting from denial of rehearing en banc).

2. The City intends to seek this Court's review of the Ninth Circuit's decision, which, in addition to misconstruing this Court's decision in *Powell*, conflicts with decisions of other appellate courts and raises questions of national importance.

As noted in the principal dissent from denial of rehearing en banc, the Ninth Circuit's decision conflicts with decisions of at least two other federal courts of appeals and the California Supreme Court. In *Joel*, the Eleventh Circuit upheld an ordinance "regulat[ing] where 'camping' occurs" because it "targets conduct, and does not provide criminal punishment based on a person's status." 232 F.3d at 1362. The Fourth Circuit reached a similar conclusion, upholding a state law allowing a court to "issue a civil interdiction order to any person who 'has been convicted of driving any automobile,

truck, motorcycle, engine or train while intoxicated or has shown himself to be a habitual drunkard,'" *Manning*, 900 F.3d at 143, because the law "does not . . . punish the illness[, but] instead targets what takes place when the illness manifests itself in conduct harming or potentially harming other persons," *id.* at 153. Although the Fourth Circuit agreed to rehear *Manning* en banc, that simply confirms the importance of this issue and the conflicting decisions it has engendered. Finally, the California Supreme Court in *Tobe* considered an Eighth Amendment challenge to a municipal ordinance that "banned 'camping' and storage of personal property, including camping equipment, in designated public areas." 9 Cal. 4th at 1080. "The Court of Appeal invalidated the ordinance [because] it imposed punishment for the 'involuntary status of being homeless,'" but the California Supreme Court reversed, explaining that "[t]he ordinance permits punishment for proscribed conduct, not punishment for status." *Id.* at 1104.

The Ninth Circuit's decision also has important, far-reaching implications. Ordinances like those adopted by the City are critical to ensure local governments can encourage individuals experiencing homelessness to enter shelters, where they will have access to medical care, drug treatment facilities, and other social services, rather than becoming trapped in dangerously unhealthy encampments. But since the decision in this case issued, municipalities have ceased enforcing their ordinances directing homeless residents into shelters. *See Martin*, 920 F.3d at 595 n.12 (M. Smith, J., dissenting from denial of rehearing en banc). With homelessness reaching record levels, it is all the more important that cities have access to the tools they need to address this urgent crisis and the public health challenges it presents. *See* Anna Gorman & Harriet

Blair Rowan, *The Homeless Are Dying in Record Numbers on the Streets of Los Angeles* (U.S. News Apr. 23, 2019), https://www.usnews.com/news/healthiest-communities/articles/2019-04-23/homeless-dying-in-record-numbers-on-the-streets-of-los-angeles; Anna Gorman & Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless* (The Atlantic Mar. 8, 2019).

3. Additional time is necessary to permit counsel to prepare and file a petition that adequately addresses these important issues. An extension of 60 days is warranted because counsel of record was not involved in the prior proceedings in this case and therefore requires additional time to study the record and relevant case law. In addition, counsel of record has numerous preexisting professional responsibilities in the next several weeks, including several out-of-town business meetings; a motion to compel arbitration due on June 7, 2019 in *Webb v. DoorDash, Inc.*, No. 19-cv-0665 (N.D. Ga.); a Respondent's Brief due on June 7, 2019 in *Monster, LLC v. Beats Electronics, LLC*, No. B285994 (Cal. Ct. App.); a mediation on June 13, 2019; a motion to dismiss due on June 13, 2019 in *Roane County v. Jacobs Engineering*, No. 2019-cv-78 (Cir. Ct. for Roane County, Tenn.); a motion to dismiss due on June 17, 2019 in *Anderson v. Jacobs Engineering*, No. 2019-cv-81 (Cir. Ct. for Roane County, Tenn.); a motion to dismiss due on June 18, 2019 in *Johnson v. Sony Music Entertainment Inc.*, No. 19-cv-01094 (S.D.N.Y.); a Respondent's Brief due on June 20, 2019 in *Halyard Health, Inc. v. Kimberly-Clark Corp.*, No. B294567 (Cal. Ct. App.); a motion due on June 25, 2019 in *Vincent v. Postmates Inc.*, No. RG19019205 (Alameda Cnty. Super. Ct.); and an Opening Brief due on July 5, 2019 in *Brown v. DoorDash, Inc.*, No. B295813 (Cal. Ct. App.). The

City is not aware of any party that would be prejudiced by granting a 60-day extension.

CONCLUSION

Accordingly, the City of Boise respectfully requests that the time to file a petition for a writ of certiorari be extended by 60 days, to and including August 29, 2019.

Respectfully submitted,

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